

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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LOVELYNN GWINN, individually, and on	:	
behalf of all others similarly situated,	:	CASE NO. 1:22-cv-02883-DLC
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
LAIRD SUPERFOOD, INC.,	:	
	:	
Defendant.	:	
	:	
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## JOINT STATUS UPDATE

Pursuant to the Court's January 5, 2023 Pretrial Scheduling Order (ECF No. 35) and the Court's February 24, 2023 Order on the Letter Motion for Extension of Time (ECF No. 39), the Parties hereby file this Joint Status Update.

## 1. Update of Events

The Parties engaged in mediation on March 30, 2023 before Mr. Brian Gallagher, Esq. after referral from the Court's mediation program. Unfortunately, no agreement was reached during mediation.

The Parties have further exchanged initial disclosures, as well as expert designations and reports concerning the metrology issues in this matter pursuant to the Court's Order. No other discovery has been conducted.

**2. Settlement and ADR**

The Parties believe an additional private mediation may be fruitful.

**3. Scheduling**

The Parties have differing proposals for next steps in this litigation.

**A. Defendant's Proposal**

Defendant proposes that this case can be resolved quickly through *Daubert* motions that address the sufficiency of the bases for Plaintiff's measurement claims, as the Court suggested at the January 5, 2023 pretrial conference. If, for example, the Court grants Defendant's *Daubert* motion, then Plaintiff would be without a factual basis for her claims, and the case can be resolved through summary judgment. If, however, the Court does not preclude the evidence through a *Daubert* motion, the parties can proceed to class certification.

Thus, Defendant proposes that, in the interest of judicial efficiency and preserving the Court's and the parties' resources, the parties first resolve dispositive expert issues, and the Court enter the following schedule.

Event/Deadline	Date
Deadline to file <i>Daubert</i> motion	June 30, 2023
Deadline for Oppositions to <i>Daubert</i> motions	July 21, 2023
Deadline for Replies in support of <i>Daubert</i> motions	July 31, 2023
Hearing on <i>Daubert</i> motions	August 10, 2023

Defendant proposes that the Court defer setting any other dates in the action. After resolution of this motion or motions, Defendant proposes that the Court hold a further status

conference on whether to proceed to summary judgment or class certification, and associated discovery.

Further, the expert witness disclosure deadline has passed, and therefore Defendant disputes Plaintiff's request for the Court to set further expert disclosure dates. On January 5, 2023, the Court set deadlines for Plaintiff's expert disclosures and Defendant's rebuttal expert disclosures pursuant to Rule 26(a)(2)(B), and ordered that "[a]ll expert discovery must be completed by April 7, 2023." (EC No. 35.) Upon Plaintiff's request, the Court extended Plaintiff's expert disclosure deadline to March 10, 2023, and continued the expert witness discovery completion date to April 28, 2023. (ECF No. 39.) In granting the extension, the Court advised that "[t]here shall be no further extension of the March 10 date." (*Id.*) Defendant's deadline to identify rebuttal expert witnesses passed on April 28, 2023. (ECF No. 45.) As the deadline for the parties to disclose expert witnesses as required under Rule 26(a)(2)(B) has passed, no further expert disclosures are permitted. Thus, should the Court be inclined to enter any dates beyond those for *Daubert* motions, any schedule should not allow for further expert witness disclosures.

## **B. Plaintiff's Proposal**

Plaintiff is not necessarily opposed to conducting the *Daubert* motions on an advanced schedule with respect to the metrology experts. Plaintiff also sees a benefit to moving forward with a traditional schedule associated with putative class actions such as this matter, and presents the timeline below as an alternative.

Plaintiff however disagrees that the expert disclosures applied to all experts in this matter. During the telephonic pretrial conference held on January 5, 2023, the Court focused its

discussion on the metrology experts and provided its timeline for expert reports and disclosures based solely on timing related to Plaintiff's metrology expert being able to produce a report. (See Transcript, Ex. "A" [repeatedly referring to the "expert" report in the singular; p. 6:22-23 ("Experts are going to opine on how many teaspoons one package of this product is correctly measured to hold...") It would have been impractical, if not impossible, for Plaintiff to provide the expert reports commonly associated with putative consumer class actions on such a short timeframe. For example, Plaintiff would need a consumer perception survey and an economic analysis conducted to determine the price premium associated with the missing product. This would logically require the metrologist comes first before the economist, as it is likely the economist would rely on the metrologist's findings. Moreover, these experts would need the benefit of discovery in order to do surveys, as well as to do the economic analysis as they would rely on sales data, competitor information, and other information and documents that can only be obtained through discovery. Plaintiff's interpretation of the Court's order was therefore that it was limited to the metrology expert reports, which is what both parties have now exchanged.

Plaintiff's Proposed Timeline:

<b>EVENT/DEADLINE</b>	<b>DATE</b>
Last day to file Plaintiff's Motion for Class Certification	June 7, 2024
Plaintiff's Further Expert Disclosures and Reports Due	June 7, 2024
Last day to file Laird's Opposition to Plaintiff's Motion for Class Certification	July 12, 2024
Laird's Further Expert Disclosures and Reports due	July 12, 2024

<b>EVENT/DEADLINE</b>	<b>DATE</b>
Last day to file Plaintiff's Reply in Support of Motion for Class Certification	August 9, 2024
Plaintiff's Further Rebuttal Expert Reports Due	August 9, 2024
Hearing on Motion for Class Certification	November 22, 2024 (or at the Court's convenience)
Last Date to Conduct Settlement Conference or Mediation	June 7, 2024
Discovery Cutoff	90 days after decision on class certification
Last day to file dispositive motions (if necessary)	90 days after decision on class certification
Last day to file oppositions to dispositive motions (if necessary)	35 days after filing of dispositive motions
Last day to file replies to dispositive motions (if necessary)	28 days after filing of the oppositions to dispositive motions
Hearing on dispositive motions	At the Court's convenience
Final Pretrial Conference (Tuesdays)	To be set by the Court
Trial	Jury Trial Estimated Length: 5-7 days Date: to be set by the Court

DATED: May 5, 2023

**CUSTODIO & DUBEY, LLP**

By: /s/ Robert Abiri

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*Attorney for Plaintiff and the  
Putative Classes*

DATED: May 5, 2023

**DAVIS WRIGHT TREMAINE LLP**

By:       /s/ Jacob Harper      

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**EXHIBIT "A"**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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LOVELYNN GWINN,

Plaintiff,

v.

22 Cv. 2883 (DLC)

LAIRD SUPERFOOD INC.,

Defendant.

Remote Conference

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January 5, 2023  
2:30 p.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

CUSTODIO & DUBEY LLP  
Attorneys for Plaintiff  
BY: ROBERT ABIRI

DAVIS WRIGHT TREMAINE LLP  
Attorneys for Defendant  
BY: JACOB HARPER



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(The Court and parties appearing via teleconference)

THE COURT: Is counsel for the plaintiff ready to proceed?

MR. ABIRI: Yes, your Honor. Happy New Year.

THE COURT: Could you please state your name on the record.

MR. ABIRI: Yes, your Honor. This is Robert Abiri for plaintiff, Lovelynn Gwinn.

THE COURT: Thank you.

For the defendant, is the defendant ready to proceed?

MR. HARPER: Yes, your Honor. Good afternoon. This is Jacob Harper, of Davis Wright Tremaine, for Laird Superfood.

THE COURT: Thank you so much.

Counsel, I am going to ask you to identify yourself by name when you speak so that the record is clear.

Counsel are in California and have asked to conduct this conference remotely, and I agreed.

The motion to dismiss made in this case was denied on December 1st, at least in part. This has to do with whether or not the label for the products incorrectly indicated the correct teaspoon measures that should be used.

There is a potential for class certification here. I have received the parties' proposals, or maybe I should say Rule 26(f) report. Thank you for that, counsel.

It appears to me that we should only be talking about

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1 a New York class. There are only New York claims. I don't  
2 know that there is a request for any amendment at this time,  
3 other than we need a final class definition.

4 So, Mr. Abiri, you had an opportunity to amend  
5 already. Is there going to be a further amendment other than  
6 for the class definition?

7 MR. ABIRI: Your Honor, there is a small potential  
8 that we might add a California claim to this, but as of now, I  
9 can't say for sure. So that would be the only aspect of  
10 amendment. But I don't believe so. So it would only probably  
11 be to, like your Honor said, define the class.

12 THE COURT: Let's have a schedule then for any  
13 amendment, knowing that it will be at a minimum to define the  
14 class.

15 Shall we say two weeks? And let me put a date on  
16 that.

17 Shall we say January 20, Mr. Abiri?

18 MR. ABIRI: That should be fine, your Honor.

19 THE COURT: Thank you.

20 And that will be for amendment and any joinder, though  
21 I don't expect you plan to join any additional defendant. Am I  
22 right, Mr. Abiri?

23 MR. ABIRI: That is correct, your Honor.

24 THE COURT: OK. Good.

25 I want to talk with counsel about the sequencing here.

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1 And one of the issues that you discuss in your report is when  
2 the motion to certify a class should be made. It's not  
3 entirely clear to me what the defense is going to be here.  
4 And, Mr. Harper, I would like you to address that as well. And  
5 depending on what I am hearing, I wonder whether we should move  
6 directly into expert discovery and if that's a better setup for  
7 positioning the case for resolution and eventually, if  
8 necessary, for trial.

9 So why don't I start with you, Mr. Harper, and then I  
10 will turn to you, Mr. Abiri.

11 Mr. Harper.

12 MR. HARPER: Thank you, your Honor.

13 I think in terms of defense of the case, I will  
14 broadly categorize it under two umbrellas. One is plaintiff's  
15 sort of injury issues, whether there was reliance on the  
16 disclosures, and if so, whether she was injured in some way  
17 that is common to the class. And then the second issue is more  
18 substantive, and that is whether the label in the disclosures  
19 about -- well, whether the label was mislabeled in the first  
20 place.

21 I do see the value, your Honor, in having some kind of  
22 expedited, or moving up the expert portion of that, because it  
23 does seem that the substantive defense, as well as plaintiff's  
24 substantive burden, will sort of turn on that issue.

25 THE COURT: So the allegations in the complaint really

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1     hinged on the density of the product and how you get a correct  
2     teaspoon measurement with respect to the product or the  
3     products.

4             Is the defendant contending that, when you properly  
5     measure the product in per teaspoon quantities, that the label  
6     was in fact correct?

7             MR. HARPER: Yes. And I think going further, we  
8     suspect that there is a difference between the way a product is  
9     sort of scooped up by a reasonable consumer versus what I think  
10    perhaps someone did in preparation of the complaint, which is  
11    smash it down and change the normal density. I think that that  
12    has a major impact on how someone would view this. So I think  
13    that your Honor hit it on the head, that the density is one of  
14    the core issues here.

15            THE COURT: So shouldn't we just put expert discovery  
16    front and center and have the plaintiff's expert report due,  
17    let's say a month from now, and just resolve this on the merits  
18    with respect to a decision perhaps on *Daubert* motions or  
19    deciding if there is a disputed issue but at least enough to be  
20    presented to a jury, Mr. Harper?

21            MR. HARPER: I think in the abstract that probably  
22    works. We may want to talk about whether a month or two months  
23    or whatever, but in terms of getting this resolved, that seems  
24    like it would make sense.

25            THE COURT: So, Mr. Abiri, did you have a reaction?

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1 MR. ABIRI: Yes, your Honor. Just to quickly address  
2 counsel's points he brought up on his end.

3 We do think there is a common injury to the class. If  
4 they are getting shortchanged on the servings, on the amount of  
5 product that's in there, that would be for everyone, not  
6 limited to one or two people. And in terms of the expert  
7 reports and things like that, I see your Honor's point. I  
8 would still like to do some discovery at least, and maybe we  
9 can push out the expert report exchange a little bit further  
10 than a month. But I would still like to do some discovery and  
11 get some more information on my end as well. But I do see your  
12 Honor's point. Like Mr. Harper said in the abstract. But  
13 perhaps a month down the road may be a little too soon for  
14 that, in my opinion.

15 THE COURT: What discovery do you need in order to  
16 submit your expert report?

17 MR. ABIRI: To submit my expert report, probably not  
18 much. But in terms of understanding Laird's process of how  
19 they developed those measurements themselves, I think that  
20 would be relevant on our end.

21 THE COURT: I am not sure I see it the same way.  
22 Experts are going to opine on how many teaspoons one package of  
23 this product is correctly measured to hold, and whether the  
24 defendant was negligent or not in making its own measurements,  
25 if there is no misrepresentation or mislabeling, that's the end

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1 of the plaintiff's case. Correct?

2 MR. HARPER: I agree, your Honor.

3 THE COURT: Mr. Abiri.

4 MR. ABIRI: I understand your Honor's point.

5 THE COURT: So let's work out a schedule then for  
6 expert discovery, or disclosures I should say.

7 How long will it take you to produce your expert  
8 report, Mr. Abiri?

9 MR. ABIRI: I would have to contact my expert and get  
10 in touch. Would the Court be OK with setting it out two  
11 months?

12 THE COURT: Am I right this is how many teaspoons  
13 properly measured this bag holds? Is it that straightforward,  
14 Mr. Harper, from your point of view?

15 MR. HARPER: Yeah. Frankly, yes.

16 THE COURT: Mr. Abiri, why don't we compromise here  
17 and give you close to two months. Why don't we have  
18 plaintiff's expert report due February 24 and defendant's  
19 expert report will be due March 17. And we will close expert  
20 discovery on April 7th.

21 Then, why don't counsel write me by April 14 with your  
22 proposals about next steps. Either there is going to be a  
23 *Daubert* motion or a summary judgment motion or an agreement by  
24 the parties that we must proceed because there are factual  
25 disputes. I don't want to assume what the outcome of this

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1 exchange of expert reports is going to be.

2 Does that kind of schedule work for you, Mr. Abiri?

3 MR. ABIRI: Yes, your Honor, that schedule would work  
4 for me.

5 THE COURT: Mr. Harper.

6 MR. HARPER: Yes, your Honor. My only question is,  
7 for April 14, would your Honor just like a joint submission  
8 from both of us, again, sort of along the lines of the Rule 26  
9 report?

10 THE COURT: Yes. It would be lovely if you have a  
11 joint agreed-to proposal. But if you don't, you will just  
12 present each side's proposal, and I will probably get you on  
13 the phone and hear you out, and we will come up with another  
14 schedule.

15 MR. HARPER: Fair enough.

16 THE COURT: Now, counsel, it's also possible that this  
17 may be appropriate to be settled very early on and quickly.

18 Is there any possibility of that, Mr. Abiri?

19 MR. ABIRI: Your Honor, in terms of plaintiff's  
20 position, we are open to settlement and mediation. We  
21 discussed it briefly with Mr. Harper when we met and conferred  
22 prior to filing our preconference statement, and Mr. Harper can  
23 explain on his end, but I believe his client hasn't come back  
24 yet with a decision one way or the other. But in terms of  
25 plaintiffs, we are open to that.

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1 THE COURT: Mr. Harper, is it worthwhile at all  
2 sending you for early mediation or not?

3 MR. HARPER: I think it may be. The reason I didn't  
4 want to commit to Mr. Abiri at the time is because it was the  
5 holidays and I hadn't had a direct conversation with the client  
6 that could give me a yes or no either way.

7 I will put it this way. If your Honor orders us to  
8 try to work it out, we will do what we need to do to try to do  
9 that. I am not promising that it will resolve, but we will  
10 work in good faith to do what we need to do. And if it  
11 resolves, it does. And if we need the expert reports to help  
12 push things along, then so be it.

13 THE COURT: Great. I am going to say that this case  
14 must be mediated during a period that will end on March 17. So  
15 I will send you to a mediator, and I will let counsel and the  
16 mediator decide whether to try to mediate this in January or  
17 February or early March. I can see that your positions would  
18 be affected potentially by what plaintiff's evaluation of its  
19 own expert report is and by the defendant's evaluation of the  
20 plaintiff's expert report. So I will get out an order to that  
21 effect.

22 Now, counsel, if you have any disputes during this  
23 litigation, you must meet and confer and try to resolve them in  
24 good faith. If you still have a dispute after that process,  
25 write me a letter no longer than two pages. I will get you on



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1 the phone and hear you out.

2 OK. I think we have a schedule at least for the  
3 preliminary phase of this case.

4 Mr. Abiri, anything else we need to address?

5 MR. ABIRI: No, your Honor. Thank you.

6 THE COURT: Mr. Harper.

7 MR. HARPER: No, your Honor. I appreciate your  
8 thoughtful approach to getting this moving along.

9 THE COURT: Thank you so much.

10 Good luck, counsel. And again, Happy New Year.

11 (Adjourned)